IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 3426 of 2002

For Approval and Signature:

HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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AJAY KIRITKANT GHELANI & 2 - Petitioner(s)
Versus
MATHURESHNAGAR CO-OPERATIVE HOUSING SOCIETY LTD. & 1 - Respondent(s)

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Appearance :
MR DHIRENDRA MEHTA for Petitioner
MR BS PATEL for Respondents

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CORAM : HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 01/11/2007

CAV JUDGMENT

1. By this petition under Article 226 and 227 of the Constitution of India, the petitioners have

challenged the judgement and order dated 16th February, 2002 passed by the Gujarat State Co-operative Tribunal (Annexure-I) in Revision Application No.41 of 2002 as well as order dated 22nd January, 2002 passed by the Board of Nominees, Surat in Lavad Case No.376/90 (Annexure-C).

2. The facts stated briefly are that the Respondent No.1, Mathureshnagar Co-operative Housing Society Ltd. (hereinafter referred to as the respondent Society) had instituted Lavad Suit No.376/90 before the Board of Nominees seeking a declaration that the petitioners No.1 and 2 are bogus members of the society, holding and occupying Plots No.40 and 41, respectively. The respondent Society also prayed for interim injunction restraining the petitioners from making further construction over the respective plots in the society. It appears that an ex-parte injunction order was passed in favour of the respondent-society and an application Exh.80 was filed in connection with breach of the said injunction. The orders passed on those applications were challenged by the petitioners before the Gujarat State Co-operative Tribunal (Tribunal) on 18.10.1993, which came to be allowed on 31.1.1994, and the matter was remanded for fresh decision on merits after hearing the parties within a month. There were further proceedings before this Court as well

as the Board of Nominees and the Tribunal, which ultimately culminated into an order dated 24th April, 2000 passed by this Court in Special Civil Application No.6266 of 1998. The aforesaid order dated 24th April, 2000, insofar as the it is relevant for the purpose of the present petition reads as under:

> *"Be that as it may, the Special Civil Application is disposed of in the terms as what the learned counsel for the parties agreed that they will complete their evidence in time bound programme. The plaintiffs shall complete their evidence within two months commencing from 12th June, 2000. They themselves will produce evidence, meaning thereby, the Board of Nominees will not issue any Summons etc. for production of the evidence, meaning thereby, the plaintiffs themselves without any assistance and aid of the Board of Nominees shall produce the evidence. Thereafter, the defendants will complete their evidence within two months. They have also to produce all of their evidence without any assistance or aid of the Board of Nominees. The Board of Nominees will then pass the final order within a period of one month. This programme shall be scrupulously followed by the Board of Nominees and compliance of the same be reported to this Court. XXXX"*

3. It appears the pursuant to the aforesaid order the Lavad Suit proceeded further and the evidence on behalf of the respondent-society (original plaintiff) was recorded. Thereafter, the petitioners No.1 and 2, individually executed power of attorneys dated 7.12.2001 in

favour of petitioner No.3 authorizing him to give depositions on their behalf as well as to take all necessary action in connection therewith and to perform all acts in relation to the case in the pending proceedings of Lavad Suit No.376/90 and also for consequential acts in that behalf in the said proceedings. By an application Exh.264, certified Xerox copies of the said power of attorneys were produced before the learned Nominee on 5.1.2002. The learned Nominee on the same day ordered to take the certified Xerox copies of both the power of attorneys on record of the said Lavad Suit.

4. Thereafter, on 7.1.2002, the respondents filed an application Exh.265 on the following grounds (1) objecting against permission being granted to the petitioners to produce the power of attorneys; (2) praying that if the case of the petitioners No.1 and 2 claiming to be members is true, they should depose before the court as witnesses to prove the same; (3) that earlier, in these very proceedings power of attorney had been misused and the production of power of attorneys in question was a ploy to ensure that the original members do not depose before the court, which was a malafide practice and that the request to permit the power of attorney to depose on behalf of the defendants be rejected; (4) that it was in the interest of the plaintiff society to put certain questions to

the defendants No.1 and 2, hence it was necessary to keep them present during the course of cross-examination. It was prayed that examination-in-chief be permitted to commence on condition that the defendants No.1 and 2 remain present during cross-examination.

5. The aforesaid application was decided by the Board of Nominees by the impugned order dated 22.1 2002, wherein it was observed that on one pretext or the other the proceedings were being delayed and the case could not be disposed of within the time bound programme as directed by the High Court. The learned Nominee further observed that the High Court had directed that the parties should produce evidence within the stipulated time limit without any kind of assistance, hence, it was necessary to ensure that the case proceeds in a smooth manner. Therefore, if the parties desire to lead evidence they shall have to produce their own evidence and have to accordingly co-operate in disposing of the case. Hence, it was not necessary to obtain orders for placing the responsibility of producing evidence on others. The Nominee accordingly ordered that the power of attorney produced on 5.1.2001 shall not remain in effect and the parties shall be required to produce their own evidence in the matter.

6. Being aggrieved by the aforesaid order, the petitioners carried the same before the Tribunal by way of revision under section 150 (9) of the Gujarat Co-operative Societies Act, 1961 (the Act) being Revision Application No.41/2002. By the impugned order dated 16.2.2002, the Tribunal dismissed the Revision Application and confirmed the order passed by the Board of Nominees giving rise to the present petition.

7. Heard, Mr. Dhirendra Mehta learned Advocate for the petitioners and Mr. B.S. Patel learned Advocate for the respondents.

8. Mr. Mehta learned Advocate for the petitioners vehemently assailed the impugned orders passed by the Board of Nominees as well as the Tribunal. It was submitted that the learned Nominee could not have declared or held the documents of power of attorney to be invalid or ineffective; that the learned Nominee had no authority, power or jurisdiction to decide the legality, validity and propriety of the documents of power of attorney which was not within its competence and jurisdiction.

8.1 Mr. Mehta drew the attention of the Court to the fact that by the application Exh.264, the petitioners had produced the power of attorneys on record and that vide order dated

5.1.2002 the learned Nominee had permitted the same to be taken on record and submitted that once permission was granted to produce the power of attorneys on record, by implication it meant that the learned Nominee had also granted permission to examine the petitioner No.3 on behalf of petitioners No.1 and 2. Hence, the learned Nominee could not have backed out from his own decision and reviewed his own order of permitting the petitioner No.3 to examine himself, also as a power of attorney of petitioners No.1 and 2 and thereby compel the parties or the petitioners to examine themselves individually and produce their evidence individually.

8.2 It was submitted that the document of power of attorney executed by a person, empowers the person in whose favour the said document is executed, to do any act for and in the name of the person who executed it. It was pointed out that the provisions of the Code of Civil Procedure are applicable to the proceedings before the learned Nominee under section 99 of the Act. That once the documents of power of attorney had been permitted to be placed on record, the learned Nominee had no authority to exercise powers under section 99(2) of the Act again.

8.3 It was submitted that under the provisions of

the Code of Civil Procedure, where there are more than one defendants, any one or more of them could be authorized by any other of them to appear, plead or act for such other, in any proceedings, similarly by virtue of the order dated 5.1.2002, the petitioner No.3 had already been permitted to appear on behalf of the petitioners No.1 and 2 before the learned Nominee. It was contended that once having allowed the power of attorney holder to act and appear on behalf of the petitioners No.1 and 2, the Nominee could not have turned back on the said order while deciding the application Exh.265 moved by the respondent-society.

8.4 It was argued that the Tribunal had erred in deciding the Revision Application on the basis of unwarranted presumptions viz. (1) that the power of attorney has misguided the Court in the past, (2) that the petitioner No.3 wanted to keep the executants of the power of attorney aside, (3) that the petitioner No.3 wanted to examine himself, and (4) that the petitioners No.1 and 2 are in a position to give deposition as they are not residing outside India. It was submitted that those issues were beyond the scope of the Revision Application as none of the said issues had been decided or in any manner appreciated by the learned Nominee while compelling the

parties to produce their evidence themselves.

8.5 It was contended that the learned Nominee had misinterpreted the order passed by the High Court as the said order does not specifically compel the parties to produce their evidence individually by producing themselves before the Court individually, but the parties are directed to complete their evidence without waiting for the summons from the learned Nominee. It was submitted that the High Court had not in any manner restrained the petitioners No.1 and 2 from executing power of attorney and/or empowering the petitioner No.3 to act as their power of attorney.

8.6 It was further contended that the Tribunal had committed serious error of law in ignoring the provisions of the Power of Attorneys Act, 1882 as also the provisions of Order I, Rule 12 and Order IX of the Code of Civil Procedure read with the provisions of section 99 of the Act. It was submitted that the Tribunal had erred in placing reliance upon the decision of the Rajasthan High Court in the case of ***Ram Prasad v. Hari Narain & Ors.*** (AIR 1998 Rajasthan 185) which is not applicable to the present case.

8.7 In support of his submissions, Mr. Mehta learned Advocate for the petitioners placed reliance upon the following decisions:

(i) The decision of the Rajasthan High Court rendered in the case of ***Kailashi Devi v. Matadeen Agarwal*** (2002 (1) Civil LJ 220).

(ii) The decision of the Karnataka High Court rendered in the case of ***Smt. Gangava v. Arjunsa*** (2002(1) Civil LJ 223).

(iii) The decision of the Bombay High Court rendered in the case of ***Shri Humberto Luis and Another v. Shri Floriano Armando Luis and Another*** (2000 (1) CCC 207 (Bom)).

(iv) The decision of this Court rendered in the case of ***Anil G. Shah v. J. Chittranjan Co. & Anr.*** (1998 (1) GLR 303).

(v) The decision of this Court rendered in the case of ***Parikh Amratlal Ramanlal, Trustee and Administrator of Sanskrit Pathshala Institution and others v. Rami Mafatlal Girdharilal*** (AIR 1983 NOC 108 (Guj)).

(vi) The decision of the Bombay High Court rendered in the case of ***the Anglo French Drug Co. Pvt. Ltd. v. R.D. Tinaikar*** (AIR 1959 Bombay 21).

(vii) The decision of the Rajasthan High Court rendered in the case of ***Samdhukhan v.***

Maddanlal (AIR 1959 Rajasthan 35).

(viii) The decision of the Bombay High Court rendered in the case of ***A.S. Patel and others v. National Rayon Corporation Ltd.*** (AIR 1955 Bombay 262)

8.8 Mr. Mehta learned Advocate for the petitioners submitted that the Tribunal had placed reliance upon the decision of the Rajasthan High Court in the case of ***Ram Prasad v. Hari Narain*** (Supra) wherein it was held that the word “acts” in Rule 2 of Order III of the Code of Civil Procedure does not include the act of Power-of-Attorney holder of a party and that the Power-of-Attorney holder can appear only as a witness in his personal capacity. It was pointed out that the Bombay High Court in the case of ***Humberto Luis*** (supra) had disagreed with the view taken in the said decision and had held that the provisions contained in Order III Rule 2 of the Code of Civil Procedure, cannot be construed to disentitle the Power-of-Attorney holder to depose on behalf of his principal. It was pointed out that in a subsequent decision in the case of ***Kailashi Devi*** (supra) the Rajasthan High Court while dealing with the issue as to whether in a case where the plaintiff does not appear as his/her witness but produces the evidence through Power of Attorney, it could be said

that the evidence of such Power of Attorney is not evidence in place of the plaintiff or that non appearance of the plaintiff itself shall tantamount to taking adverse inference against such party, had agreed with the view taken by the Bombay High Court in the case of ***Humberto Luis*** (supra) and held that it was settled law that power-of-attorney is a competent witness and is entitled to appear as such. It was further pointed out that the Karnataka High Court in the case of ***K. Shreedhar*** (supra) had disagreed with the view taken by the Rajasthan High Court in the case of ***Ramprasad v. Hari Narain*** (supra) and had followed the decision of this Court in the case of ***Parikh Amratlal Ramanlal*** (supra) and held that there is no express bar made in the provisions of C.P.C. to debar the power of attorney to be examined as witness on behalf of the parties to the proceedings. It was, accordingly submitted that the petitioner No.3 as a Power-of-Attorney holder was competent to appear as a witness on behalf of the petitioners No.1 and 2 and that both, the Board of Nominees as well as the Tribunal had erred in holding to the contrary. In conclusion it was submitted that the impugned orders being contrary to the settled legal position as held by various Courts, including this Court, were required to be quashed and set aside and the petitioner No.3 ought to be permitted to depose on behalf

of the petitioners No.1 and 2 in the Lavad proceedings.

9. On the other hand Mr. B.S. Patel, learned Advocate for the respondents supported the impugned orders. It was submitted that the view taken by the Rajasthan High Court in the case of ***Ramprasad v. Hari Narain*** (supra) was the correct view and that the Tribunal had rightly followed the said decision. Referring to the order dated 24.4.2000 passed by this Court whereby certain directions had been issued, it was submitted that as per the said directions, the parties were directed to produce the evidence themselves, hence, the plaintiffs as well as the defendants were required to produce evidence on their own and that it was not open for the defendants (present petitioners No.1 and 2) to lead evidence through the petitioner No.3 who was their Power-of-Attorney holder.

9.1 Referring to the provisions of section 99 of the Act which provide for the procedure for settlement of disputes and power of Registrar, his nominee or board of nominees, it was submitted that under the said provision the nominee was empowered to summon and enforce attendance of witnesses including the parties interested or any of them and to compel them to give evidence, and to compel the production of documents by the same means and as far as

possible in the same manner as provided in the case of a Civil Court by the Code of Civil Procedure, 1908. It was further submitted that the Gujarat Co-operative Societies Act, 1961 is a special Act and wherever the Legislature wanted to introduce the provisions of the Code of Civil Procedure, the same had been specifically introduced. It was accordingly submitted that except where specifically provided the provisions of the Code of Civil Procedure cannot be made applicable to proceedings under the Act, hence, the decisions relied upon by the learned Advocate for the petitioners do not in any manner support the case of the petitioners. It was submitted that the impugned orders are just, legal and proper and do not call for any intervention by this Court.

9.2 It was next contended that the petitioners had failed to point out any jurisdictional error in the impugned orders. Placing reliance upon the decision of the Apex Court in the case of ***Mohd. Yunus v. Mohd. Mustaqim and others*** (AIR 1984 SC 38) wherein it was held that that a mere wrong decision without anything more is not enough to attract the jurisdiction of the High Court under Article 227, it was submitted that in effect and substance, this Court was exercising powers under Article 227 of the Constitution of India, hence, in the absence

of any jurisdictional error being pointed out no interference is warranted at the hands of this Court.

9.3 It was further submitted that supervisory jurisdiction cannot be exercised or writ cannot be issued at the instance of a party against whom there are allegations of mischief. It was submitted that the impugned orders have to be read in the spirit, circumstances and considerations under which the same are passed. It was urged that the anxiety of the authorities is to see that the defendants No.1 and 2 (petitioners No.1 and 2 herein) depose before the Court. It was submitted that when there are provisions like section 99 of the Act which empower the authorities to compel the parties to produce evidence, in absence of lack of jurisdiction, no cause for interference has been made out and the petition deserves to be dismissed.

10. From the facts noted above, it is apparent that the principal issue involved in the present case is as to whether the petitioner No.3 as the general power-of-attorney holder of petitioners No.1 and 2 is competent to depose on behalf of the petitioners No.1 and 2 in the Lavad proceedings before the Board of Nominees. Though various decisions of different High Courts including this Court have been cited in

connection with the said issue, it would not be necessary to refer to the same at length in view of the fact that the said issue is no longer *res integra*. The Apex Court in the case of ***Janki Vashdeo Bhojwani and another v. Indusind Bank Ltd. and others*** (2005) 2 SCC 217 has held as follows:

> *"13. Order 3 Rules 1 and 2 CPC empower the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order 3 Rules 1 and 2 CPC confines only to in respect of "acts" done by the power-of-attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder had rendered some "acts" in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal in respect of acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.*
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> *17. On the question of power of attorney, the High Courts have divergent views. In the case of Shambhu Dutt Shastri v. State of Rajasthan, it was held that a general power-of-attorney can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in the witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power-of-attorney*

holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff.

18. The aforesaid judgement was quoted with approval in the case of Ram Prasad v. Hari Narain. It was held that the word "acts" used in Rule 2 of Order 3 CPC does not include the act of power-of-attorney holder to appear as a witness on behalf of a party. Power-of-attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but he cannot appear as a witness on behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of CPC.

19. In the case of Pradeep Mohanbay (Dr.) v. Minguel Carlos Dias, the Goa Bench of the Bombay High Court held that a power of attorney can file a complaint under Section 138 but cannot depose on behalf of the complainant. He can only appear as a witness.

20. However, in the case of Humberto Luis v. Floriano Armando Luis on which reliance has been placed by the Tribunal in the present case, the High Court took a dissenting view and held that the provisions contained in Order 3 Rule 2 CPC cannot be construed to disentitle the power-of-attorney holder to depose on behalf of his principal. The High Court further held that the word "act" appearing in Order 3 Rule 2 CPC takes within its sweep "depose". We are unable to agree with this view taken by the Bombay High Court in Floriano Armando.

21. We hold that the view taken by the Rajasthan High Court in the case of Shambhu

Dutt Shastri followed and reiterated in the case of Ram Prasad is the correct view. The view taken in the case of Floriano Armando Luis cannot be said to have laid down a correct law and is accordingly overruled."

11. Applying the principles enunciated in the aforesaid decision to the facts of the present case, the petitioner No.3 as power of attorney can appear, plead and act on behalf of the petitioners No.1 and 2 but he cannot be a witness on behalf of the petitioners No.1 and 2 and depose in place of and instead of them. In other words, the petitioner No.3 as power-of-attorney holder can only appear in his own capacity but not as a witness on behalf of the petitioners No.1 and 2 in the capacity of the petitioners No.1 and 2. However, if the petitioner No.3 power-of-attorney holder had rendered some "acts" in pursuance of the power of attorney, he may depose for the petitioners No.1 and 2 in respect of such acts, but he cannot depose for them in respect of acts done by the them and not by him. Similarly, he cannot depose for the petitioners No.1 and 2 in respect of the matters of which only they can have a personal knowledge and in respect of which they are liable to be cross-examined. The principal issue involved in the present petition, therefore, stands answered against the petitioners.

12. It has been contended by the learned Advocate for the petitioners that any decision adverse to the petitioners was required to be taken at the time of deciding the application Exh.264, however, once the Board of Nominees had permitted the documents of power of attorney to be taken on record it could not have passed a contrary order on an application made by the respondents. It has also been contended that by permitting the said documents to be brought on record the learned Nominee had impliedly granted permission to examine the petitioner No.3 on behalf of the petitioners NO.1 and 2. In this regard it may be pertinent to refer to Exh.264, a copy of which is annexed to the petition. A bare perusal of the document Exh.264 shows that the same is an application for production of the documents enumerated therein viz. certified copies of power of attorneys on behalf of the petitioners No.1 and 2. Therefore, by granting the application all that has been done is that the petitioners have been permitted to place on record the certified copies of the power of attorneys. The said order cannot in any manner be read to imply that permission had been granted to examine petitioner No.3 on behalf of petitioners No.1 and 2, so as to debar the learned Nominee from deciding the objections raised in this regard.

13. Insofar as the merits of the impugned orders

are concerned, as can be seen from the order of the Board of Nominees, the learned Nominee has held the in view of the directions of the High Court the parties are required to produce their own evidence within the stipulated time limit, without any assistance. The learned Nominee has further held that the power of attorney produced on 5.1.2002 shall not remain in effect and each party shall be required to produce its own evidence. The Tribunal while upholding the order of the Board of Nominees had followed the decision of the Rajasthan High Court in the case of ***Ram Prasad*** (supra) and has held that the power of attorney cannot claim as of right to appear before the court and give deposition and that the court has exercised discretion in this case which is legally and rightly exercised.

14. Examining the impugned orders in the light of the decision of the Supreme Court cited hereinabove, both the lower courts are justified insofar as it is held that the petitioner No.3 is not competent to depose on behalf of the petitioners No.1 and 2. However, while holding as aforesaid the Board of Nominees has also held that the power of attorney shall have no effect, which as rightly contended by the learned Advocate for the petitioners was not within the scope of authority or jurisdiction of the learned

Nominee. The Tribunal has not entered into the said aspect and has merely confirmed the order of the Board of Nominees. Hence, to that extent the decision of the Board of Nominees is erroneous and requires to be set aside.

15. However it is clarified that permitting the petitioners to place on record the power of attorney shall not be construed as permission to do all acts as stated in the said power of attorney. The clarification is necessitated in view of the fact that the document of power of attorney also empowers the petitioner No.3 to depose on behalf of the petitioners No.1 and 2, which is not permissible under law as held by the Supreme Court in the case of ***Janki Vashdeo Bhojwani*** *(supra)*. Therefore, under the said power of attorney the petitioner No.3 shall be entitled to appear, plead and act on behalf of the petitioners No.1 and 2, but shall not appear as a witness on behalf of the petitioners No.1 and 2.

16. For the foregoing reasons, the petition succeeds in part. The impugned order passed by the Board of Nominees is quashed and set aside to the extent it holds that the power of attorney will not have any effect, and the impugned order of the Tribunal is quashed and set aside to the extent it confirms that part of the order of the Nominee. The petition is

accordingly, partly allowed. Rule is made absolute to the aforesaid extent. The ad-interim relief granted vide order dated 20.2.2002 stands vacated. There shall be no order as to costs.

[HARSHA DEVANI, J.]

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